Phillips Pipe Line Company *and* Local 2, International Union of Operating Engineers, AFL–CIO. Case 14–CA–19351

April 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On March 15, 1989, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief.[1] The General Counsel and the Charging Party filed cross-exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

1. Contrary to the judge, we find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally conditioning unit employees' receipt of enhanced severance benefits on their execution of a general release of liability. The Board has previously found that a general release of liability has too attenuated a link to the actual terms and conditions of employment to constitute, in and of itself, a mandatory subject of bargaining. See *Borden, Inc*., 279 NLRB 396, 399 (1986). See also *Plattdeutsche Park Restaurant*, 296 NLRB 133 (1989) (withdrawal of pending delinquent contribution actions found to be nonmandatory subject of bargaining). Under the unique circumstances of this case, we find no basis for concluding that the release was ''so intertwined'' with a mandatory topic of bargaining as to warrant treating it as a mandatory subject of bargaining. Cf. *Sea Bay Manor Home for Adults*, 253 NLRB 739, 740 (1980), enfd. 685 F.2d 425 (2d Cir. 1982) (agreement to use interest arbitration was mandatory subject of bargaining because agreement was so intertwined with other mandatory subjects).

In this regard, we emphasize that the only issue before us is whether the Union was entitled to demand bargaining over the release requirement, which the Respondent included in its enhanced severance benefit package. Neither the complaint nor the parties' briefs question the Respondent's right, pursuant to article XVII of the parties' collective-bargaining agreement, to offer unilaterally to employees any part of the enhanced severance benefit package except the release requirement.[3] Moreover, none of the parties contend, and there is no evidence to establish, that the Respondent was contractually obligated to offer the enhanced pay to employees who did not sign a release.[4] Thus, there is no allegation in this case that the Respondent unilaterally imposed an extra-contractual condition on the receipt of contractually-mandated benefits which themselves constitute a mandatory subject of bargaining.

Accordingly, because Section 8(a)(5) only requires employers to notify, and on request to bargain with, a union concerning changes in mandatory subjects of bargaining, the Respondent's unilateral implementation of the release condition—under the unique circumstances previously described—was not unlawful. *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 176 (1971) (unilateral modification of retiree health insurance plan–-a nonmandatory subject of bargaining—not unlawful).[5]

2. We also find, contrary to the judge, that the release which the Respondent obtained from the plan participants did not unlawfully waive the employees' right of access to the Board. In this regard, we find it clear from the language of the release itself that it applies only to claims, causes of action, or grievances pending and/or resulting from circumstances predating the execution of the release.[6] Under the terms of the

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Indeed, the judge found that art. XVII waived the Union's right to bargain over these matters. None of the parties have excepted to this finding.

[4] In this regard, it would appear that art. XVII at most required the Respondent to offer the enhanced severance benefits to unit employees on the same basis as it was offered to nonunit employees–-that is, to those employees who signed the release.

[5] Although we reverse the judge's finding that the Respondent violated Sec. 8(a)(5), we do so for reasons other than those advanced by the Respondent's exceptions. Thus, for the reasons stated by the judge, we reject the Respondent's argument that it was relieved of any bargaining obligation because the Union failed to demand bargaining when presented with the enhanced severance benefit plan.

[6] The text of the release, in pertinent part, is as follows:

GENERAL RELEASE OF LIABILITY

1988 Special Layoff Pay Plan of Phillips Petroleum Company For and in consideration of the sum of Dollars ($_____) less payroll deductions required by law, which amount includes all amounts due me under the 1988 Special Layoff Pay Plan of Phillips Petroleum Company, the adequacy and sufficiency of which is hereby acknowledged, I, _____, do hereby voluntarily release and forever discharge Phillips Petroleum Company, its subsidiaries and affiliated companies and all of their directors, officers, and employees (hereinafter called ''Released Parties'') from all causes of action, liabilities, claims, debts and agreements which I or my heirs may have, now or at any time in the future, for any and all known or unknown causes resulting in whole or in part from occurrences or circumstances that predate the effective date of this General Release, whether or not in contract or in tort, whether or not for personal injury, illness, disability, or property damage, whether or not for expenses or attorneys' fees, whether or not any of same are in any way related to my employment or the termination of my employment, and whether or not based on discrimination, retaliation, negligence, gross negligence, intentional conduct or intentional inaction, including but not limited to any

enhanced severance benefits plan program, the release must be executed within 14 days after the participant is laid off. Participation in the program is voluntary, with no loss of contractual benefits if an employee refuses to sign the release. Moreover, employees are not asked to sign the release until after the layoff decision is made. Under these circumstances, we find that the release does not restrain or coerce employees with regard to the filing of unfair labor practice charges concerning future incidents and is therefore not violative of the Act. See *First National Supermarkets*, 302 NLRB 729.

In concluding that the release was unlawful, the judge principally relied on his findings that the release applied to incidents predating the release's execution which were unrelated to the layoff, and that the release would prevent an employee from seeking the Union's assistance in filing future grievances with regard to such incidents. However, the Board has held that a release may lawfully compromise or waive the right to file future grievances arising from incidents in the past and may also lawfully apply to matters beyond the scope of the incident or dispute which led to its execution. *First National Supermarkets*, supra. In each case the critical issue is whether execution of the release restrains or coerces employees in the exercise of protected rights. For the reasons set forth above, we find that this release does not.

Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Mary J. Tobey, Esq., for the General Counsel.
Gerald D. Morris, Esq. (Shepherd, Sandberg & Phoenix), of St. Louis, Missouri, for the Respondent.
J. F. Souders, Esq., of St. Louis, Missouri, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The original charge, first amended charge, and second amended unfair labor practice charges were filed on February 5 and 12 and March 2, 1988, by Local 2, International Union of Operating Engineers, AFL–CIO (the Union), against Phillips Pipeline Company (Respondent). A complaint was issued by the Regional Director on July 28, 1988. The complaint alleged that the Respondent violated Section 8(a)(1) of the Act by unilaterally implementing a 1988 layoff program of enhanced benefits which included a waiver and release of liability to be executed by the recipient bargaining unit and nonbargaining unit employees on their option to accept such benefits, and that Respondent violated Sections 8(a)(1) and (5) of the Act by failing to give the Union an opportunity to negotiate and bargain as the exclusive employee bargaining agent with respect to the waiver and release of liability condition implementation and its effects on bargaining unit employees.

The Respondent denied the commission of any unfair labor practice and asserted that the Union had waived any right to negotiate or bargain over any aspect of the 1988 layoff program and that all aspects of that program were promulgated and implemented for good-faith, legitimate, noncoercive business reasons.

The trial in this case was conducted before me at St. Louis, Missouri, on September 30, 1988, at which time stipulation of fact as well as testimonial and documentary evidence were adduced. By November 7, 1988, written briefs were submitted by Respondent and the General Counsel. On this entire record, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent is, and has been at all times material, a corporation duly organized under and existing by virtue of the laws of the State of Delaware. At all times material, Re-

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claim or cause of action under any and all federal, state and local laws or ordinances, Executive Orders, rules, regulations and all agreements that pertain to employment, employment discrimination, or any injury, disability or illness, except any claim or cause of action for personal injury, or illness that I might have under any applicable workers' compensation statute.

. . . .

Also, for the same consideration, I convenant and agree at my sole cost and expense to do all things necessary to cause the prompt dismissal, with prejudice, of any and all grievances, charges, investigations, proceedings, claims and suits by me, or on my behalf, involving any matters included in this General Release that are now pending or filed in any court or now pending or filed, in, with or before or to be investigated, conciliated or heard by any arbitrator, governmental administrative agency or commission, or hearing officer; and I covenant and agree to defend and hold Released Parties harmless from all costs, liability and expenses, including attorneys' fees, as a result of any activity, legal representation, suit or proceeding now or hereafter brought by my spouse, other members of my family, any of my dependents or any other third party or entity for any remedy, loss or damage that may be available or have been caused in whole or in part by any grievance, charge, claim or cause of action included in this General Release.

. . . .

I agree that should any application of any provision of this General Release be, or be determined to be, invalid, unenforceable and/or prohibited by law, all other applications hereof and/or all other provisions hereof shall be unaffected thereby.

. . . .

I HEREBY ACKNOWLEDGE THAT I HAVE READ THIS GENERAL RELEASE, THAT I HAVE RECEIVED A TRUE AND ACCURATE COPY OF THIS GENERAL RELEASE, THAT I UNDERSTAND THAT BY SIGNING THIS GENERAL RELEASE THAT I MAY BE RELEASING VALUABLE RIGHTS AND/OR INCURRING SUBSTANTIAL OBLIGATIONS AND THAT PRIOR TO SIGNING I WAS AFFORDED THE OPPORTUNITY TO TAKE THIS GENERAL RELEASE TO AN ATTORNEY OF MY CHOICE.

. . . .

I understand that all amounts due me under the 1988 Special Lay off Pay Plan of Phillips Petroleum Company shall be paid to me in the manner set forth by the terms of the Plan. I also understand that I would not be eligible for payment under the 1988 Special Layoff Pay Plan of Phillips Petroleum Company but for my granting this General Release. I agree to return all amounts paid pursuant to this General Release and indemnify and hold harmless each of the Released Parties for and against any and all costs, loss or liability, whatsoever, including reasonable attorneys' fees, caused by any action or proceeding, in any state or federal court or administrative process, which is brought by me or my successors in interest if such action arises out of, is based upon, or is related to any claim, demand, or cause of action that is covered by this General Release. Furthermore, I agree that the said return or said obligation to return any amounts paid pursuant to this General Release will not abrogate or affect in any way my said full release of any and all said claims against the Released Parties.

spondent, with an office and place of business in Cahokia, Illinois (East St. Louis Terminal), has operated a pipeline used for the interstate transportation of refined oil products. During the 12-month period ending June 30, 1988, Respondent, in the course and conduct of its business operations described herein, sold and shipped from its Cahokia, Illinois facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Illinois.

It is admitted, and I find, that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that the Charging Party is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS

Since 1980, Respondent's East St. Louis terminal's operating and maintenance employees have been represented by the Union which succeeded its predecessor, Local 893, in that same capacity.

The term of the collective-bargaining agreement is from June 1, 1986, to May 31, 1988. Article XVII of that contract, as had prior contracts since 1977, sets forth that all ''security plans and benefits'' offered to nonbargaining employees ''are available'' to bargaining unit employees covered by the terms of the contract, inclusive, inter alia, of layoff pay. However, the contract language specifies:

> The conditions, rules and regulations as may be established by the company determine all questions concerning security plans and benefits. Detailed information an the provisions and application of the security plans and benefits to all . . . .

The Respondent decided to effectuate a cost-savings plan in reaction to earning losses experienced in late 1987. Included among other cost-savings efforts was a reduction in personnel employment by means of a layoff. Thus was born the 1988 Special Lay Off Program, a main feature of which included the 1988 Special Lay Off Pay Plan, i.e., greater layoff pay than that which was provided under the terms of the collective-bargaining agreement. The Special Lay Off Program provided numerous other benefits as well. The difference in monetary benefit was significant. The Special Lay Off Pay Plan was by its terms made optional to all unit and nonunit employees, but was conditioned upon the execution of a general liability release. Rejection of that Special Lay Off Pay Plan had no effect on the receipt of contractually provided benefits to the unit employees.

In mid-December 1987, Respondent addressed all unit and nonunit employees by bulletin promulgation and advised them, inter alia, of the onset of a financially difficult 1988, that cost-savings programs would be effectuated, that reductions of 7–10 percent in the work force were to be expected, that an enhanced severance program would be instituted, that additional information would be announced on January 5 and that employee informational meetings would be conducted. General Counsel witness, unit employee, and current Chief Union Steward Charlie Plew testified that he first learned about: the enhanced Special Lay Off Plan ''around the first week of January '88.'' However, he identified and conceded the universal posting and probable mailing of the December 16 bulletin.

A summary of the 1988 Special Lay Off Program inclusive of the enhanced layoff pay feature was prepared and printed by the Respondent. It was dated January 4, 1988, and distributed to employees and posted on the same date.

The parties stipulated that on January 5 the Special Lay Off Programs ''became effective'' (one for employees under, and one for employees over 50 years of age, both of which for matters material herein are essentially the same and which will be referred to in the singular). The parties further stipulated that the Special Lay Off Pay Plan included in the Special Lay Off Program was ''implemented by Respondent effective January 5, 1988,'' and that the condition of receipt of those enhanced pay benefits was the execution by the unit or nonunit employees who opted for it of a General Release of Liability, as it is set forth on two and one-half of the last three pages of the printed 1988 Special Lay Off Program.

The release of liability waived all claims, courses of action, debts, etc., against ''Phillips Petroleum Company, its subsidiaries and affiliated companies'' and all their employees arising from presently or future existent causes, known or unknown, resulting from circumstances predating the release whether or not related to the termination of employment, including but not limited to discrimination, negligence, or intentional conduct inclusive of, inter alia, any claim arising under any Federal, state, or local laws, executive orders, etc., except personal injury or workers' compensation claims. The waiver also undertakes the dismissal of all grievances, claims, suits, and proceedings presently pending in any forum and also undertakes to hold Respondent harmless from all costs for any proceeding covered under the terms of the waiver. Included in the release language is an acknowledgement that opportunity was provided for review of the release by the signator's attorney inasmuch as ''valuable right,'' are being waived. Also included in the release language is the agreement that if any part of the General Release is to be thereafter determined to be invalid or prohibited by law, the other provisions will remain unaffected.

On or about January 12, Respondent's northern regional manager Gary Heinz was informed by his corporate superiors that layoffs would be effectuated at the East St. Louis terminal which would be covered by the 1988 Special Lay Off Program. Heinz testified that he was instructed to have a ''general information meeting with the [Union's] business agent and with the stewards to go over this plan.'' He testified that the newly appointed terminal manager, Ed Kimber, was assigned to arrange a meeting which ultimately was held on January 19.

The parties stipulated that layoffs commenced at the East St. Louis terminal on January 15 for nonunit employees and on January 29 for unit employees. Robert Herbst, the union officer assigned to service the bargaining unit, testified that he was notified of a meeting on January 14 by Heinz. There is a discrepancy as to what Heinz stated to him as the purpose of the meeting, but it is clear that on consultation with the then chief steward, Herschel Riddle, Herbst expected the subject of discussion to be the impending layoffs. No witness testified that either Herbst or any other union representative was verbally advised in advance of the details of the Special Lay Off Plan, i.e., the waiver of liability clause. The meeting

was held at the St. Louis airport, apparently for the convenience of Joseph Livingston, the staff director, labor relations and equal employment manager of Phillips Petroleum Company and conceded agent for Respondent herein. Herbst was advised by Heinz that Livingston was en route through St. Louis at the time. Livingston's headquarters is in Oklahoma.

The meeting at the St. Louis airport on January 19 was attended by Livingston, Heinz, Kimber, Herbst, Riddle, and Plew. At the meeting the Respondent's agents recounted its financial difficulties and stated that layoffs of from six to eight unit employees would be effectuated, of which the specific identity and exact number were as yet undetermined. There was some strong reaction from the union representatives that was directed to the merits of the layoff decision. Livingston testified that he was present to give a detailed description of the Special Lay Off Program beyond that set forth in the previously distributed summary and he did so, including a description of the General Liability Release. Some questions and comments were raised with respect to the Special Lay Off Program. With respect to the general liability release, Herbst testified that Livingston read the terms of it from the document itself which he held in his hands and from which he read other provisions. Copies of the document were also tendered to the union representatives.

Herbst testified that Heinz asked him, ''Now that you heard the benefit program, how do you feel about it?'' According to Herbst, he answered that he questioned the legality of this thing,'' asserted that it would ''have to be taken to our attorneys'' and that he stated:

> Here you put something in front of me one day [and] there's no way that I can agree on this thing today.

Herbst testified that after an immediate short silence, other discussion ensued not related to the ''major issue of general release.'' He testified that at the end of the meeting, after some inconclusive discussion of educational assistance benefits which precluded discussion of other areas of the special program, he shook hands with Livingston and asked him that if the Union's attorneys ''have problems with this General Release of Liability,'' did he wish him to contact Livingston or Kimber. According to Herbst, Livingston said not to contact him but that Herbst should have the union attorney contact Respondent's attorney. Herbst testified that after the meeting he mailed a copy of the release to Union Attorney Souders and did not hear anything more nor did he do anything more until Monday, January 25, when, ill at home, he received a telephone call from the chief steward who informed him that six unit employees were summoned to Kimber's office, notified that they would be the initial layoffs and were confronted with the General Liability Release option.

Livingston testified that during the meeting on the January 19, Herbst questioned the legality of the release with respect to its references to grievances and that he told Herbst that ''if he had a concern about it he should discuss it with Souders his counsel, and let us know.'' Livingston testified that he told Herbst that the release had been reviewed by Respondent's legal staff and that Respondent considered it to be ''appropriate.'' Livingston testified that the union representatives expressed a concern of general employee unrest at the terminal and that they wanted Respondent not to delay but to accelerate. Herbst denied this and claimed that the effectuation of the Special Lay Off Plan was left as an open question because of the issue of legality of the release having been questioned. In cross-examination, Livingston explained that the purpose of the January 19 meeting was to present the 1988 Special Lay Off Plan as an option available to the unit employees and to explain it. He affirmed that he did not present that plan nor any part of it, inclusive of the general liability release, as a negotiable matter, i.e., he admitted that it was nonnegotiable. Phillips Petroleum Company Manager of Employee Relations Jerry Fultz, agent of Respondent and superior to Livingston, testified as to his responsibility in connection with the development of the 1988 Special Lay Off Program. Fultz readily conceded that final corporate approval of the plan was obtained by no later than January 4 and that Livingston had no authority to negotiate any changes in the plan.

Kimber testified that with respect to the questioned legality of the liability release at January 19 meeting, Herbst was told to ''have his lawyers get ahold of our company lawyers if they didn't believe it was legal.'' Plew's testimony supports the thrust of Respondent's testimony to the effect that the entire Special Lay Off Program, and specifically the waiver clause, was presented for disclosure only and not for purposes of negotiation. Thus Plew testified that Respondent's representatives described the liability release as having been approved by their legal staff and that they were satisfied with its legality. Although he recalled that Herbst stated that the union attorney would review it, he did not recall a reference to the union attorney calling the company attorney nor any discussion inviting union input that might be considered for modification purposes. Plew further testified that no request was made to change any of the proffered Special Lay Off Program features at this meeting except the reference to legality of the waiver. According to Plew, the only attempt at negotiation was an aborted effort to have Respondent reconsider the need for layoffs. It is clear from the testimony of Plew and Respondent witnesses whom I credit, that if Livingston had suggested an exchange of telephone calls between legal counsel, it was done for informational assistance only and not done as an invitation to negotiate either the Special Lay Off Program or the contents of the General Release Liability proviso, and that Respondent had determined on the effectuation of its unilaterally constructed Special Lay Off Plan, including that proviso, with finality prior to January 19.

On January 20, Respondent posted notice at its East St. Louis terminal of layoff of four classifications, i.e., three operators, one special repairman, one laboratory tester, and one custodian. On January 29, six unit employees were laid off. On February 29, another two unit employees were laid off. Five of those laid-off employees opted for the 1988 Special Lay Off Program and executed the general liability release and thus received enhanced layoff pay. One employee, J. H. Overton, refused to sign the release and chose to pursue a grievance wherein he protested that his layoff was not in accord with his seniority rights. The laid-off employees were afforded 14 days within which to execute and return the general liability release.

At no time did the Union explicitly agree to the terms of the liability release, nor did it explicitly request bargaining about it after January 19. At no time did Respondent offer

to negotiate the terms of that release. There is no evidence that the union attorney had communicated with Respondent's legal counsel after the meeting of January 19.

Respondent adduced uncontradicted testimony to the effect that it has been Respondent's policy and practice to have unilaterally determined on the content and effectuation of its company sponsored (or ''company placed'') security and benefits packages, i.e., those plans devised for nonbargaining unit employees but which are offered to bargaining unit employees through collective-bargaining contract sanction on a take-it or leave-it nonnegotiable basis, despite an occasional request for negotiation. Indeed, Plew testified that during his 28-1/2 year tenure, he was unaware of any request by the Union to negotiate any of the company sponsored security and benefits plans proffered to employees during those years.

It is undisputed that a general release of liability had never previously been inserted as a condition of receipt of company placed benefits by the bargaining unit employees herein. Fultz testified that a general liability release had been used for company placed layoff benefits and pay at other ''Phillips'' locations since 1987, including a synthetic rubber plant in Texas where major layoffs occurred. He testified that the use of the release was developed in consequence of sex and age discrimination litigation arising from the 1982 Kansas City Refinery shutdown. Fultz testified that in Respondent's past experience involving layoffs made pursuant to managerial discretion, there was a likelihood of employee perception of unequal treatment. Fultz testified that access to the NLRB did ''not enter into our thinking at all'' as Respondent was ''more concerned about age, sex discrimination issues than whether the employee could go to the National Labor Relations Board or EEO, EEOC, or whoever else.'' However, Respondent expressed no willingness to voluntarily modify the language of those disputed waivers.

Analysis

As found above, Respondent did in fact unilaterally implement a Special Lay Off Program, inclusive of enhanced layoff pay, conditioned on execution of the disputed general release of liability. Contrary to the testimony of Herbst, I find that Respondent did not invite last-minute negotiation of the issue of legality of the general liability release at the January 19 meeting. Further, I find that contrary to Respondent's argument in its brief, the Union was not proffered with a reasonable opportunity to request bargaining about the waiver. I find rather that the entire 1988 Special Lay Off Program, inclusive of all conditions including liability waiver execution, was decided on with finality and announced as such to the Union on January 19. Thereafter, it would have been futile for the Union to have requested bargaining.

With respect to the NLRA, the scope of the waiver clearly proscribes any access to the Act for any cause of action covered thereunder, inclusive of unfair labor practice charges based on discrimination for any union or concerted protected activities activities predating the execution. The liability release does not limit the waiver to claims arising solely from the specific 1988 layoff incident itself, nor does it even limit its coverage to Respondent but extends beyond to a near universality of possible claims against Respondent and its parent corporation and affiliated corporations.

The General Counsel's argument as to the invalidity of the implementation of the general release is twofold. It is argued that first the general liability release was unilaterally implemented without opportunity to negotiate with the Union and thus violative of Respondent's bargaining obligations under Section 8(a)(5) of the Act. Secondly, it is argued that the implementation of that waiver constituted an independent violation of Section 8(a)(1) of the Act as it coercively intruded on unit and nonunit employees rights to free access to NLRA protection.

With respect to the 8(a)(5) issue, the General Counsel does not allege as violative the implementation of any other aspect of the 1988 Special Lay Off Program nor that such implementation, save for the release of liability clause, deviated from either contractual sanction or past practice. The General Counsel appears to concede the credible and unrefuted testimony in the record as to article XVII of the contract and its past implementation. The General Counsel argues that the release of liability condition for enhanced backpay is not within the scope of ''conditions, rules regulations'' that have been contractually permitted in Respondent's past practice. The General Counsel argues that the parties had never discussed that type of condition. Merely because a condition of implementation is a novel condition cannot of itself escape coverage of article XVII. Otherwise, the contractual proviso would be a nullity, as any new ''condition, rule or regulation'' for the receipt of a company placed benefit by unit employees would be subject to negotiations. Such a suggestion runs contrary to the clear language and sense of the contract as well as past practice that all questions as to ''conditions, rules, and regulations'' for such receipt are to be determined by the Respondent.

The General Counsel, however, argues further that Respondent's assertion of contractual sanction under article XVII of the bargaining agreement is fallacious because the verbage therein does not ''explicitly'' waive the Union's right to bargain with respect to the implementation of a general release of liability as a condition of receipt of company placed benefits. The General Counsel takes cognizance of *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), and *Gaso Pump*, 274 NLRB 532 (1985), and acknowledges that by a ''clear and unmistakeable waiver,'' a union may waive individual rights as long as it does not breach its duty of fair representation in so doing. The *Metropolitan* case is the product of a long line of precedent whereunder a purported waiver of basic statutory rights is carefully scrutinized and narrowly interpreted. The *Metropolitan* case involved union officials' receipt of harsher discipline in the enforcement of a contractual no-strike clause. The *Gaso* case dealt with an alleged waiver of striker reinstatement rights. Another area where the Board holds proper a union waiver of individual rights is in the genre of strike settlement cases wherein a union, in settlement of its own bargaining dispute with an employer, may also effectively waive the individual's right to file a charge. For a recent discussion of this issue, see *Gulf Oil Co*., 290 NLRB 1158 (1988), and *Energy Cooperative*, 290 NLRB 635 (1988). The same criteria of interpretation of asserted waiver has, of course, been applied to the resolution of whether a contractual managerial rights proviso constitutes a waiver of the Union's own right to notice and bargaining opportunity with respect to the unilateral changes in mandatory bargaining subjects such as working conditions. See, for example, *United Technologies Corp*., 287 NLRB 198 (1987), wherein the Board found that the contractual au-

thorization to unilaterally ''make and apply'' disciplinary rules also necessarily encompasses the authority to unilaterally ''change'' such rules as any difference was ''semantical'' in nature.

In evaluating the clarity of a clear and unmistakeable waiver, the Board considers context and specific circumstances to be crucial, and it finds that an unmistakeable waiver can occur in three ways, i.e., ''by express contract language, by the parties' conduct including bargaining history and past practices or by a combination of both.'' *Energy Cooperative*, supra. In the *Energy* case, the Board found that a strike settlement which ''resolved all outstanding issues'' between the parties clearly and unmistakeably waived sick and disabled employees' right to receive benefits denied during the strike. The relationship between the waived union rights and the individual statutory rights was clear, direct, and necessary to settlement.

The General Counsel argues that although the article XVII language empowers Respondent to establish ''conditions, rules and negotiations'' concerning implementation of company-placed benefits on unit employees, that such language cannot logically be construed to authorize implementation of a condition consisting of a waiver of basic individual statutory rights. The General Counsel argues that the enabling language herein must logically be interpreted to be limited to ''the substantive qualifications for participation in Respondent's benefit plans such as the length of service required for different measures of benefits.'' The General Counsel points to no extrinsic evidence to support this conclusion other than the silence of the parties in past negotiations with respect to a general liability release condition. There is no extrinsic evidence that past ''conditions, rules, and regulations,'' that had been unilaterally implemented, had in fact been limited to the ''substantial qualifications'' as described by the General Counsel. There is no extrinsic evidence that Respondent had not historically imposed ''procedural'' conditions upon the receipt of company-placed benefits by unit employees. Of necessity, some procedures must have been involved in the administration of such programs and Respondent's testimony as to the totality of its past such unilateral implementation is not rebutted.

However, the procedural conditions historically unilaterally implemented by Respondent were not shown to have been other than that having a direct relationship to means of granting the company-placed benefit and limited to such implementation. The evidence herein clearly demonstrates that with respect to this unit, the condition of waiver of statutory rights and other rights not related to the substance and ministerial implementation of company-placed benefits was unprecedented and challenged immediately by the Union.

The question raised herein is whether as a matter of policy the broad language of a purported broad waiver of bargaining rights must, in the absence of extrinsic evidence, explicitly (or at least with more specificity) set forth the waiver of basic individual statutory rights if it is to be considered to be of sufficient clarity.

With respect to the issue of whether a broad contractual no-strike clause waived an individual's statutory right to engage in a sympathy strike, the Board had previously held that where the no-strike language did not explicitly prohibit a sympathy strike, such specific intent must be shown by other extrinsic evidence. *United States Steel Corp*., 264 NLRB 76 (1982), enf. denied 711 F.2d 772 (7th Cir. 1983). In *Indianapolis Power Co*., 273 NLRB 1715 (1985), the Board reversed this precedent and found that a broad no-strike clause shall be read plainly and literally to prohibit all strikes as a matter of logical interpretation of the industrial characterization of all work stoppages as a ''strike.'' The U.S. Court of Appeals for the District of the Columbia remanded the case to the Board for consideration of some extrinsic evidence noted by the administrative law judge with respect to the determination of the issue of clarity of waiver. The Board in *Indianapolis Power Co. II*, 291 NLRB 1039 (1988), reaffirmed that a broad no-strike clause should properly be read to include sympathy strikes ''unless the contract as a whole or extrinsic evidence intended otherwise.''

Prior to *Indianapolis Power* and the recent line of cases involving strike settlement waivers such as *Energy Cooperative*, the Board had been very cautious with respect to the extension of general broad waivers to basic individual statutory rights; e.g., *United States Steel*, supra, and *Emerson Electric Co*., 246 NLRB 1143 (1979), enfd. as modified 650 F.2d 463 (1981), cert. denied 455 U.S. 939 (1982). In reevaluating the interpretation of broad no-strike clauses and the effect of strike settlement waivers, the Board has not abandoned in principle its historic policy to carefully scrutinize the extent of waivers on individual statutory rights. The broad no-strike language was interpreted as having a logical extension to sympathy strike behavior by the meaning of the language of the waiver as used in today's industrial parlance. The strike settlement waiver was limited to waiver of statutory rights, in turn limited to the matter settled. I conclude that the Board in *Indianapolis Power* did not intend to abandon the basic rationale that a broad waiver of a union bargaining right cannot be interpreted to constitute a waiver of specific basic individual statutory rights in the absence of extrinsic evidence of such, particularly where the bargaining right waived is different in nature from the individual rights in issue, i.e., the right to notice and bargaining as compared with the individual's basic statutory right to engage in union and protected activities and the right to access to the NLRA. At most, the Board has suggested that in absence of extrinsic contrary evidence, it will interpret such waiver to apply where it must logically be interpreted to apply or where it effectuates the public interest, e.g., in the settlement of a specific dispute. I agree with the General Counsel that within the context of the facts in this case there can be no logical basis to conclude that the broad waiver of a statutory bargaining right contained within its intended scope the more expansive waiver of basic individual statutory rights, particularly where not limited to the scope of the unilateral action. I therefore find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the General Release of Liability as an integral condition of the 1988 Special Lay Off Program with respect to bargaining unit employees without having provided the Union with adequate notice and meaningful bargaining opportunity.

The second aspect of the unlawfulness of the General Liability Release is argued to be that it violates Section 8(a)(1) of the Act on its face by coercively inhibiting unit and nonunit employees' access to the NLRA and the processes of the Board. The General Counsel correctly argues that access to the Act and its remedies historically has been viewed by the Board as a fundamental right and, as such, carefully

guarded. The General Counsel cites Board precedent whereunder an attempted incursion of this right has been proscribed in a wide range of contexts, i.e., *Beitler-McKee Optical Co*., 287 NLRB 1311 (1982), which involved a coercive attempt to induce employees to abandon union activity and the processing of an unfair labor practice charge; *Baytown Sun*, 255 NLRB 154, 161 (1981), which involved a threat to subtract from employees' wages potential backpay clue under a Board award; *Houston Chronicle Publishing Co*., 227 NLRB 1829 (1977), involving a threat to file an action in damages against a union on the filing of changes with the Board; and *West Point Pepperell, Inc*., 200 NLRB 1031, 1039 (1972), also involving a similar threat to file a damage suit against a union unless an unfair labor practice charge was withdrawn. See also *Consolidated Edison Co*., 286 NLRB 1031 (1987); and *Carborundum Materials Corp*., 286 NLRB 1321 (1987).

The Respondent argues that the Board sanctions the use of a broad release of liability clause as a condition of settling a dispute, even where access to the Board is waived. The Respondent cites *Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB 501 (1979). In that case, an individual, Rudy Estrada, had been suspended by his employer. A grievance was filed and negotiations were in process with the collective-bargaining agent when Estrada filed an unfair labor practice charge over the suspension. The employer and the bargaining agent entered into a settlement of the suspension which reduced the discipline and which contained the following proviso:

> Mr. Estrada understands and agrees that this is a full and final settlement of the dispute with regard to his suspension on or about April 5, 1987, and agrees that no further actions or claims of any kind whatsoever will be filed in conjunction with his suspension. Further, that any charges with any governmental administrative agency, including, but not limited to, the National Labor Relations Board, will be dropped and withdrawn by Mr. Estrada as a condition of his reinstatement and, further, that no actions of any kind will ensue. [Id. at 501.]

Subsequently, Estrada amended the unfair labor practice charge to allege the foregoing proviso as an unlawful condition. He also withdrew the original part of the charge because of insufficient evidence that the suspension was related to protected activity. The General Counsel issued complaint thereafter and argued to the Board that the settlement condition unlawfully deprived Estrada from access to the Board, citing *John C. Mandel Security Bureau*, 202 NLRB 117 (1973), and *Kingwood Mining Co*., 171 NLRB 125 (1968). Those cases involved unilateral coercive attempts to dissuade employee access to the Board which the employer in *Coca-Cola* argued were distinguishable from a negotiated settlement freely agreed to by the individual employee. The Board found that there was no improper intereference with statutory rights inasmuch as the waiver was part of a freely negotiated settlement accepted by Estrada.

The Respondent herein compares the General Liability Release in this case to the Estrada waiver. However, Respondent ignores the Board's very careful observation of that decision in *Coca-Cola*, supra at 502.

> . . . the settlement agreement is limited to the suspension that occurred on or about April 5, 1978; it does not prohibit Estrada from filing unfair labor practice charges concerning future incidents or preclude him from engaging in protected concerted activity.

As found above, the general release of liability is not limited to the scope of the layoff of January 1988 but applies with near universality to any claim, including potential unfair labor practice charges that might conceivably apply to any other incident predating the release execution and it also prohibits the individual employee from engaging in the protected activity of seeking the assistance of the Union and asserting contract rights by filing future grievances over any incident arising from his employment unrelated to the layoff incident which predated the execution of the release of liability. The employees could only obtain enhanced layoff pay and benefits under the 1988 Special Lay Off Program if they surrendered ''valuable'' statutory rights. The surrender of statutory rights in this case cannot be considered to be a resolution of a dispute wherein the complainant waives future claims arising out of the incident. It is rather a clear bartering of broad potential recourse to statutory rights in return for significant monetary enhancement of layoff pay and benefits. As such, I am in agreement with the General Counsel that the 1988 General Liability Release constitutes a coercive interference with employees' access to the Board and thus violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Phillips Pipe Line Company is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 2, International Union of Operating Engineers, AFL–CIO, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent, hereinafter called the unit, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> all operating and maintenance employees of Respondent employed at the East St. Louis terminal excluding all supervisory, clerical, technical or guard personnel.

4. The Union is, and at all times material herein has been, the designated exclusive collective-bargaining representative of the unit and has been recognized as such representative by Respondent.

5. At all times material herein, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

6. Respondent violated its bargaining obligations under the Act and engaged in conduct which constituted violations of Section 8(a)(1) and (5) of the Act which constitutes unfair labor practices that interfere with the free flow of commerce by unilaterally implementing, as a condition of participation

in the 1988 Special Lay Off Program and receipt of enhanced layoff pay and benefits, the execution of a general release of liability without having afforded the Union the opportunity to negotiate and bargaining with respect to the terms, implementation and effect of that release whereby unit employees waived their rights under the Act and their access to protection of the Act.

7. Respondent violated Section 8(a)(1) of the Act and committed an unfair labor practice interfering with the free flow of commerce by conditioning unit and nonunit employees' receipt of enhanced layoff pay and benefits under the 1988 Special Lay Off Program upon their waiver of their right to access to the protection of the Act for matters unrelated to the layoff of January 1988.

THE REMEDY

I recommend that Respondent be ordered to cease and desist from its unfair labor practices and take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent unilaterally implemented the General Release of Liability as a condition for participation in the 1988 Special Lay Off Program in violation of its bargaining obligations, I recommend that Respondent be ordered to rescind that provision from the layoff program, and to make whole employee J. H. Overton for loss of enhanced pay and benefits he suffered as a result of his refusal to execute the General Release of Liability, to be calculated as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed according to *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]